SEP 1 - 1949
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 307

EITEL-McCULLOUGH, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

RICHARD EDWARD HALE JULIEN,
Mills Tower Building, 220 Bush Street, San Francisco 4, California,
Attorney for Petitioner.

BARNARD-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Eitel-McCullough, Inc., San Bruno, California, prays that a writ of certiorari may issue to review the decree of the Court of Appeals for the Ninth Circuit entered therein June 3, 1949, in a case

between the above named parties docketed therein as No. 12,255. The said decree granted respondent's motion to docket and dismissed petition for review in the Ninth Circuit of a decision of The Tax Court of the United States filed August 13, 1948, which decision of The Tax Court had determined that no excess profits tax relief was allowable under Section 721(a)(2)(C) of the Internal Revenue Code.

OPINION BELOW.

The findings and opinion of The Tax Court are reported in 9 T.C. 1132. The opinion of the Court of Appeals is reported in 174 Fed. (2d) ....., 49-1, U.S. T.C. Par. 9317.

JURISDICTION.

This Court has jurisdiction to review said decree under U. S. Code, Title 28, Sec. 1254.

This application is made within ninety days after the rendition of the judgment, or decree of the Court of Appeals, as required by U. S. Code, Title 28, Sec. 2101(c).

QUESTION PRESENTED.

Has The Tax Court of the United States, on the record in this case, complied with the statutory standards for review of relief from excess profits taxes as

required by Section 732(d) of the Internal Revenue Code?

STATUTE INVOLVED.

Internal Revenue Code:

> "*Sec. 732—Review of Abnormalities By Board of Tax Appeals* (Now the Tax Court of the United States).
>
> * * * * * * *
>
> (d) *Review By Special Division of Board.*—The determinations and redeterminations by any division of the Board involving any question arising under Section 721(a)(2)(C) or Section 722 with respect to any taxable year shall be reviewed by a special division of the Board which shall be constituted by the Chairman and consist of not less than three members of the Board. The decisions of such special division shall not be reviewable by the Board, and shall be deemed decisions of the Board."

STATEMENT.

In the summer of 1946 Eitel-McCullough, Inc. filed a petition in The Tax Court of the United States for relief from excess profits taxes for the calendar years 1940, 1941 and 1942 pursuant to Section 721(a)(2)(C) of the Internal Revenue Code. After this issue was joined, the cause was heard at San Francisco on December 9, 10 and 11, 1946, before Judge Ernest H. Van Fossan. The opinion of Judge Van Fossan, deny-

ing any relief to petitioner under Section 721(a)(2)(C) was promulgated December 17, 1947.

On January 13, 1948, a motion to vacate the opinion, and to grant an additional hearing and to reconsider findings was filed. Judge Van Fossan summarily denied this motion three days later, January 16, 1948.

On February 17, 1948, a second motion for reopening and reconsideration was, after special leave from Judge Van Fossan, granted. This second motion was heard before Judge Van Fossan March 10, 1948, and thereafter, on April 12, 1948, again denied by him.

On May 14, 1948, The Tax Court rendered its decision, wherein deficiencies in excess profits taxes for the years 1941 and 1942 were determined in the respective amounts of $115,803.01 and $190,922.79.

On August 13, 1948, Eitel-McCullough, Inc. regularly filed a petition for review of The Tax Court's decision in the Ninth Circuit Court of Appeals. The essential predicates for such review were denial of procedural due process and nonconformance with statutory requirements by The Tax Court. Your petitioner was seemingly precluded from so-called substantive review of its case before the lone Tax Court Judge by Section 732(c) of the Internal Revenue Code, and decision in the case of *James F. Waters, Inc. v. Commissioner* (C.C.A. 9), 160 Fed. (2d) 596, Cert. den. 332 U.S. 767.

Petitioner's attorney herein at all times after the promulgation of the opinion of The Tax Court on

December 17, 1947 to the date of filing this petition in the Supreme Court, has been in persistent contact with the Office of the Chief Counsel for the Bureau of Internal Revenue, looking to a fair settlement of the controversy involved, all to no avail.

On September 22, 1948, in regular compliance with rules of the Ninth Circuit, Court of Appeals, petitioner filed a motion to enlarge time in which to docket the cause therein and to transmit the Tax Court record on review. On September 24, 1948, petitioner's counsel was advised by letter that Judge Matthews had summarily denied the motion to enlarge the time to docket and order up the record.

Petitioner did not renew the purely procedural motion to enlarge time to docket and order up the record *nunc pro tunc* as there were then pending certain activities within the Bureau of Internal Revenue and Tax Court which reasonably indicated such action would be unnecessary. The Section of Taxation of the American Bar Association had, at its Ninth Annual Meeting at Seattle, Washington, September 5-9, 1948, authorized its Committee on Taxation of Corporations to recommend to The Tax Court that its rules provide for adequate review of the findings of fact and conclusions of law of the single judge who heard the cause, by the Special Division of the Board (Tax Court), as reasonably required by the statute, Section 732(d) of the Internal Revenue Code. (See details in Section of Taxation, Program and Committee Reports, September 5-9, 1948, pp. 50 to 53 inc., and pp.

110-111.) Petitioner's counsel actively followed the foregoing efforts of the American Bar Association throughout the winter of 1948 and spring of 1949. Its counsel was also in touch with the Chief Counsel and other officers of the Bureau of Internal Revenue during this period, seeking just settlement of petitioner's case without further litigation.

On May 10, 1949, petitioner received advice, without previous notice, from the Department of Justice that its motion to the Ninth Circuit, Court of Appeals, to docket and for an order to show cause why the petition for review should not be dismissed for failure to prosecute, was set for Friday, May 27, 1949.

On May 23, 1949, petitioner filed statement in opposition to the Government's motion to docket and dismiss, other supporting papers, and affidavit of its attorney in support of statement in opposition. An oral argument was had on this matter, and the Ninth Circuit, Court of Appeals, concluded that petitioner had "* * * showed no valid excuse for its failure to comply with paragraph 2 of our Rule 31." Petitioner had sought, on the record, to urge the Ninth Circuit Court to dispose of the Government's motion to docket and dismiss on any one of the three following grounds:

1. Deny the Motion to Dismiss; or,

2. Order the case docketed in the Ninth Circuit and give petitioner on review a reasonable time in which to order up the record in its Court; or,

3. Give the petitioner an opportunity, combined with No. 2, supra, to make a showing before

dismissal, that either the Ninth Circuit Court decide or certify to the Supreme Court of the United States, the question whether The Tax Court has provided adequate statutory and procedural due process standards for review, not only in this case, but in pursuance of the language of I.R.C., Section 732(d), requiring a review by "* * * a special division of the Board (Tax Court) * * *".

The practice of the "special division" of The Tax Court to inadequately review the trial judge's findings of fact and conclusions of law, has lead to the widespread theory of the tax bar that opportunity of taxpayers should be provided to assure a real and genuine review in this type of case, as was intended by the Congress. The remedy of the American Bar Association suggested to The Tax Court has been for it to provide by rule that in all cases litigated under Section 721(a)(2)(C) and Section 722, taxpayers shall be afforded an opportunity to file written exceptions to the findings of fact, make assignments of error to any conclusions of law of the trial division (single judge), and to brief these matters before reference to the three judge special division. Upon reference to the latter division, the parties shall also be afforded an opportunity to be orally heard upon the grounds assigned for review.

Petitioner believes the decision of the Ninth Circuit, Court of Appeals, if allowed to stand, has, on an adjective or purely procedural basis, effectively foreclosed taxpayers' substantive rights to relief from excess profits taxes as not intended by the Congress.

Hence the occasion for this case being sought to be brought here.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in granting the respondent's motion to dismiss the petition for review of the decision of The Tax Court reported in 9 T.C. 1132.

2. The Court of Appeals erred in failing to pass upon the question raised in this case of whether The Tax Court procedure for review of cases coming under Section 732(c) and (d) of the Internal Revenue Code meets the requirements and standards of due process as therein intended by the Congress of the United States.

3. The Court of Appeals erred in failing to certify to this Court the question of whether The Tax Court of the United States has met the procedural requirements and standards for review of Section 721(a)(2)(C) and Section 722 cases as expressed in Section 732(d) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT.

As a result of the foregoing errors, the petitioner will be wrongfully and unjustly taxed if the Court of Appeals' decision is not reversed by this Court. Unless the substantive rights of the petitioner are kept open and not foreclosed by *res adjudicata*, a gross mis-

carriage of justice will result. Petitioner is hardly a corporation fat enough to live and fight another day.

A resolution of this case is instinct of the roots and fundamentals of the political, economic and legal issues of our day. A challenge to common justice is here present—particularly to the Supreme Court of the United States. This is no run-of-the-mine case, however it appears on the surface; it is the story of two young American boys, Eitel and McCullough, whose radio high frequency electron tube was the efficient cause for success of radar in World War II, and what their development effort accomplished in the public and national interest.

An interpretation of the instant act of the Congress which must eventually be resolved by this Court is ripe in this case. Favorable action by this Court at the request of this taxpayer should prove a healthy omen.

Purely legalistic predicates for granting the issuance of the writ in this case require no keen perception nor incisive exercise of the mind, nor the delicately poised judgment of any member of this Court. Obviously an important federal question in the administration of the revenue laws is present. Secondly, there can be little doubt of the fact that existing Tax Court procedure here deprives this taxpayer of property under the due process clause of the Fifth Amendment as surely as recent decisions of this Court indicate a deprivation of civil liberties rights of individuals upon essentially the same principles. The vehicles

are readily available to this Court. There but remains the will to do equal justice under law.

Wherefore it is prayed that this petition for a writ of certiorari be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
August 24, 1949.

Respectfully submitted,
RICHARD EDWARD HALE JULIEN,
Attorney for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE,
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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

This brief will essay a concise factual approach to the problem which seems to be here involved. There should be enough legal documentation in the courts below. Beside such merits as reality has, counsel subscribes to the wise, and good humored verbiage of Chief Judge Calvert Magruder of the First Circuit who wrote in the *Harvard Law School Record* of Tuesday, January 6, 1948:

"How does the court dispose of these previous decisions? The Supreme Judicial Court of Massa-

> chusetts has developed that to a fine art: 'Cases like *Hocus v. Pocus* (citation) and *Flim v. Flam* (citation) have no application to the case at bar.' Just as simple as that! Or, 'The case of *Hemm v. Haw* (citation) rests on its own peculiar facts.' Or, better still, just ignore it."

The Tax Court of the United States has not complied with the Statute in providing an adequate review of Section 721(a)(2)(C) cases. This is a statement of provable fact. To apply a sympathetic understanding of why the foregoing statement of fact is so, is no answer to the inequity and injustice worked upon the development efforts of Eitel-McCullough, Inc. The function of this Court is essentially to decide "cases" and "controversies". So, excuses of litigants, on either side, however understandable, are usually struck down.

Now, it is well-known that The Tax Court is over five thousand cases behind on its docket. Some of the sixteen judges of that Court are probably overworked in getting out decisions on the standard tax issues of the cases assigned them. Of necessity and consequence then, the three judges of the special division assigned by the presiding judge in pursuance of Section 732 of the Internal Revenue Code cannot bring to bear the time, energy or sober detachment required to provide an adequate review of cases of the trial division or determinations of the single judge. The three judges of the special division, it should be remembered, conduct their full share of trial and decision of standard issues, to which is added this special division work. One of those three judges, from personal observation

of this brief writer, disposes of more cases in number and quality than any of his brethren. He has our utmost understanding, sympathy and respect! But the harsh fact remains the special division is closed to taxpayer scrutiny, and is reasonably suspect as a rubber stamp. So the violent impact of the facts simply do not square with either the legislative intent nor the judicial and American conceptions of full, open and fair trial of apposite cases and their review by the body constituted for that purpose.

All your petitioner asks, in related mood to the great majority of the bar, is an opportunity to test, by open review, the human fallibilities of a single judge in a cause fraught as surely with the lifeblood of American enterprise, its citizens and common justice, as is that of any individual brought before this Court in a civil liberties case.

We have found quite helpful, as sympathetic and in the essential spirit of the case at bar, three sources which are noted for the Court's consideration. Action in the instant case, we believe, may be prophetic in several national aspects.

The Roosevelt Court, by C. Herman Pritchett, The MacMillan Company, 1948;

The Courts and Tax Administration: A Plea for a Return to the Statutory Language, Arthur A. Ballantine, 35 Am. Bar Association Journal (May, 1949), pp. 369, et seq.;

"Stare Decisis", William O. Douglas, 4 The Record of the Association of the Bar of the City of New York 152 (May, 1949).

Wherefore, the petitioner submits the Court of Appeals for the Ninth Circuit erred in its decision, and that this petition for a writ of certiorari should be granted so that the decision may be reversed.

Dated, San Francisco, California,
August 24, 1949.

Respectfully submitted,
RICHARD EDWARD HALE JULIEN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I, Richard Edward Hale Julien, the attorney for the petitioner in the foregoing petition for a writ of certiorari, do hereby certify that said petition is not interposed for delay and that in my judgment it is well founded.

Dated, San Francisco, California,
August 24, 1949.

RICHARD EDWARD HALE JULIEN,
Of Counsel for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court is reported at 9 T. C. 1132. The opinion of the Court of Appeals (R. 37-38) is reported at 175 F. 2d 438.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1949. (R. 39.) The petition for a writ of certiorari was filed on September 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals act within its discretionary powers in dismissing the taxpayer's petition for review eight months after the expiration of the time for the filing of the record, as provided for by Rule 31, paragraph 2 of its Rules, where the taxpayer had failed to take steps to secure the filing of the record on review, and no valid excuse for such failure was shown?

RULES INVOLVED

The pertinent rules are set forth in the Appendix, *infra,* pp. 7-8.

STATEMENT

On December 17, 1947, the Tax Court handed down its opinion in this case (reported in 9 T. C. 1132). Taxpayer filed a motion to vacate the opinion and decision, which was denied by the Tax Court on January 16, 1948. A second motion for reopening and reconsideration of the case was filed, and, after argument, the Tax Court on April 12, 1948, denied that motion. (R. 2-3.) On May 14, 1948, the Tax Court rendered its decision wherein deficiencies in excess profits taxes for the years 1941 and 1942 were determined in the respective amounts of $115,803.01 and $190,922.79. (R. 3, 9.)

On August 13, 1948, taxpayer filed a petition for review of the Tax Court's decision in the Court of Appeals for the Ninth Circuit. On August 16, 1948, proof of service of a copy of the petition for review on counsel for the Commissioner of Internal Revenue was filed in the Tax Court. (R. 3, 9.)

On September 22, 1948, taxpayer filed with the Court of Appeals a motion for an extension of the time within which to complete the record on review from September 22, 1948, to and including November 21, 1948. (R. 3, 9-10, 22.) The motion was denied September 24, 1948. (R. 10.)

On May 11, 1949, the Commissioner filed with the Court of Appeals a motion to docket and for an order for the taxpayer to show cause why the petition for review should not be dismissed for failure to prosecute. (R. 2-5.) Notice of the motion was served on taxpayer (R. 1) and on May 23, 1949, taxpayer filed its statement in opposition to the Commissioner's motion (R. 8-21). On May 27, 1949, oral arguments of counsel were heard by three judges of the Court of Appeals, and on June 3, 1949, the Court granted the Commissioner's motion and ordered the petition dismissed. (R. 35, 37-38.)

ARGUMENT

The dismissal of the taxpayer's petition for review by the court below on the ground that taxpayer had shown no valid excuse for failing to file a record in compliance with the court's rules was entirely proper. The case is confined to its own peculiar facts and presents no question warranting review by this Court.[1]

Paragraph 2 of Rule 31 of the Court of Appeals for the Ninth Circuit, Appendix, *infra*, p. 8, pro-

[1] The merits of the case, to which a large portion of the petition for certiorari is devoted, were of course not considered by the court below, since there was no record before the court.

vides that the clerk of the Tax Court within forty days from the filing of the petition shall transmit a typewritten copy of the record on review to the clerk of the Court of Appeals, prepared in accordance with the provisions of Rule 75 or 76 of the Rules of Civil Procedure. Here the record was not filed within the forty days, and taxpayer made no attempt to secure an extension of time until the fortieth day, when, without notice to the Commissioner, taxpayer's attorney filed with the Court of Appeals a motion requesting an extension of sixty days. The motion was denied and taxpayer made no further effort to perfect its appeal during the eight months that followed.

Rule 75(a), Federal Rules of Civil Procedure, Appendix, *infra,* p. 7, requires the appellant (petitioner) promptly to serve on appellee (respondent) and file a designation of the portions of the record, proceedings and evidence to be contained in the record on appeal. Taxpayer wholly failed to comply with this rule. Neither promptly nor at any time did it serve upon the Commissioner or file in the Tax Court a designation. No record has been filed with the Court of Appeals. Cf. *McBee* v. *United States,* 126 F. 2d 238 (C. A. 10th). While the filing and docketing of the record is not jurisdictional, it is clear that the rules are expected to be followed, and that unless reasons satisfactory to the court are advanced as a basis for special relief from their provisions, the appeal may be dismissed. *Markham* v. *Kallimanis,* 151 F. 2d 145,

146 (C. A. 9th), certiorari denied, 327 U. S. 788; *In re Plankinton Bldg. Co.,* 133 F. 2d 900, 901 (C. A. 7th); *In re Gammill,* 129 F. 2d 501, 502 (C. A. 7th); *United States* v. *Stanton,* 172 F. 2d 642, 643 (C. A. 9th); *United States* v. *Gallagher,* 151 F. 2d 556, 559 (C. A. 9th).

The reason for the delay advanced by taxpayer's attorney in his motion for enlargement of time within which to file the record (R. 22) was that the attorney had not had time during the forty-day period to discuss the appeal with his clients. A further reason for taxpayer's neglect is set out in the "Affidavit of Attorney for Petitioner in Support of Opposition to Respondent's Motion to Docket and Dismiss for Failure to Prosecute Petition for Review" (R. 14, 16-17), viz.: These tactics were adopted in the hope that before the case was closed the Tax Court could be persuaded to amend its rules pertaining to review of cases under Section 732(d) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 732). (R. 29, 31-34.) That these reasons do not constitute the "excusable neglect" [2] for which an appellate court may overlook irregularities in perfecting an appeal is, as the Court of Appeals found (R. 38), abundantly clear, and other Courts of Appeals have specifically held that reasons of this character will not be accepted. See *Maghan* v. *Young,* 154 F. 2d 13 (C. A. D. C.),

[2] *Beecher* v. *Federal Land Bank of Spokane, Wash.,* 146 F. 2d 934, 939 (C.A. 9th); *Morrow* v. *Wood,* 126 F. 2d 1021, 1022 (C.A. 5th).

and *Markham* v. *Kallimanis,* 151 F. 2d 145 (C. A. 9th, certiorari denied, 327 U. S. 788.

The rules of procedure were intended to expedite and simplify disposition of cases. Ample provision is made in the rules to relieve against hardship and excusable neglect. Where, as here, there is both inexcusable neglect and long delay, the appellate court is justified in dismissing the appeal. *United States* v. *Schlotfeldt,* 123 F. 2d 109, 111 (C. A. 7th).

CONCLUSION

The dismissal by the lower court is correct. The case presents no important or general question, and there is no conflict with decisions of any other Courts of Appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General,
ELLIS N. SLACK,
LEE A. JACKSON,
VIRGINIA H. ADAMS,
Special Assistants to the Attorney General.

OCTOBER 1949.

APPENDIX

Federal Rules of Civil Procedure, as amended January 2, 1947:

RULE 75. RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) *Designation of Contents of Record on Appeal.* Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, * * *.

(b) *Transcript.* If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. * * *

* * * * *

(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

* * * * *

(f) *Stipulation as to Record.* Instead of serving designations as above provided, the parties by written stipulation filed with the

clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

* * * * *

Rules of the United States Court of Appeals for the Ninth Circuit:

RULE 31. THE TAX COURT OF THE UNITED STATES.

2. The clerk of The Tax Court within forty days from the filing of the petition shall transmit a typewritten copy of the record on review to the clerk of this court, prepared in accordance with the provisions of Rule 75 or 76 of the Rules of Civil Procedure for the District Court of the United States.

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